

SERVED: June 15, 1992

NTSB Order No. EA-3594

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the **1st** day of **June**, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

Docket SE-11305

MICHAEL J. FLOWERS,

Respondent.

SHOW CAUSE ORDER

As part of pretrial discovery, respondent's counsel, John M. Killian, had the law judge issue a subpoena to require the deposition testimony of Mr. Tom E. Langley.¹ After Mr. Langley testified, he sought payment of \$56.40 for his appearance at the deposition. When Mr. Langley did not receive payment, he wrote to the Administrative Law Judge who forwarded the correspondence to our Office of General Counsel. On April 30, 1991, our Office of General Counsel corresponded with respondent's counsel who correctly noted that under the Board's rules the party (not the

¹Mr. Langley was called by the Administrator as a witness at the hearing.

party's counsel) is responsible for payment of witness fees.² Respondent's counsel suggested that the witness directly contact respondent. When payment was not forthcoming, the witness corresponded with the Board again. By letter dated September 17, 1991, our Office of General Counsel asked respondent whether he had reimbursed the witness the sum requested, and if he were not going to, to explain why the Board should entertain his appeal from the law judge's initial decision. Copies of this letter were sent to counsel for both parties. Respondent did not reply to this letter. Instead, respondent's counsel in an October 15, 1991 letter requested that any communications be directed to him alone. Respondent's counsel did not state whether respondent had paid or intended to pay any fees for the witness, but respondent's counsel solicited a citation for the Board's authority to refuse to entertain his client's appeal.

Respondent's counsel does not challenge the validity of our rule requiring a party to reimburse a witness the authorized fees occasioned by compliance with a subpoena issued by an agent of the Board at the request of the party or his counsel.³ Neither respondent nor his counsel has offered any basis for contesting the merits of the sum claimed by the witness.⁴ The Board does not believe that a party should be permitted to invoke the Board's adjudicative authority, avail itself of the Board's compulsory process while disregarding the corresponding duty to

²49 C F R. §821.20 states in pertinent part:
 "§ 821.20 Subpoenas, witness fees. . . .

(b) Witness fees. Witnesses shall be entitled to the same fees and mileage as are paid to witnesses in the courts of the United States. The fees shall be paid by the party at whose instance the witness is subpoenaed or appears." The Board's enabling legislation provides that "Witnesses summoned to appear before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States." 49 U.S.C. App. §1903(b)(1).

³Such a challenge, in any event, would be frivolous in view of the witness fee payment provision in the Board's enabling legislation and the Board's broad authority to "Establish such rules and regulations as may be necessary to the exercise of its functions." 49 U.S.C. App. §1903(b)(12).

⁴Nor does the Board look with favor on counsel's failure to facilitate the payment of the witness' fees. Counsel, as the legal representative of respondent, and the person who arranged for issuance of the subpoena and specifically solicited the witness' cooperation, should have promptly forwarded the request for payment directly to respondent instead of suggesting that the witness contact the respondent.

pay the authorized fees and mileage to the witness, and thereafter continue to enjoy the benefit of plenary review by the Board. If parties are free to ignore the responsibility to pay witnesses summoned to appear by the Board at the parties' behest, the witnesses may become disenchanted with the Board, and the Board's authority to compel witnesses to appear would be injured. We believe that the Board has the inherent authority to decline to entertain an appeal from a party who refuses to comply with an express obligation to pay witness fees, as a measure necessary to insure adherence to our rules.'

ACCORDINGLY, IT IS ORDERED THAT:

Respondent show cause within 10 calendar days of the service of this Order why his pending appeal should not be dismissed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD HART and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

⁵Our law judges have been delegated the authority to, among other things, regulate the conduct of the hearing and dispose of procedural requests or similar matters. 49 C.F.R. §821.35(b)(7) and (9). This authority, in our view, would have empowered the judge to fashion an appropriate remedy for respondent's failure to comply with his express duty to pay witness fees. Since Mr. Langley's letter to the law judge advising of the nonpayment of fees was received after the law judge had rendered his decision, the law judge properly referred the matter to our General Counsel. We believe that the authority the law judge would have had to order respondent to pay the witness fees would embrace the power to have terminated respondent's appeal for failure to do so. The Board, therefore, is now merely exercising the authority it delegated to its law judge. One alternative the Board is considering is to order respondent to pay the witness fee; and if he fails to comply, to obtain an order from a United States District Court compelling payment, a violation of such a court order being punishable as a contempt of court. 49 U.S.C. App. §1903(b)(3). The Board sees little point, however, in burdening itself and the courts for any continuing failure by respondent to honor a just debt stemming from his noncompliance with a Board rule and statute(s) that conferred a benefit on him during discovery.